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No. 8[redacted]4 55

To be argued by
MAX R. SIMON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

MAX M. LESSER,

Plaintiff-Appellee,

against

SERTNER'S INC., MURRAY SERTNER and PAUL SERTNER, trading as RENOFAB PRODUCTS COMPANY,

Defendants-Appellants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MAX R. SIMON,
Attorney for Plaintiff-Appellee.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Your petitioner, Max M. Lesser, respectfully prays that a writ of certiorari issue to review the judgment and mandate of the Circuit Court of Appeals for the Second Circuit, entered in the above case on February 18, 1948, which reversed a judgment in petitioner's favor and directed a dismissal of his complaint.

Opinions Below

The opinion of the District Court (R. 461-471) is reported at 76 F. Supp. 144.

The opinion of the Circuit Court of Appeals (R. 494-500) is reported at 166 F. (2d) 471.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 18, 1948 (R. 501). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

The sole question at issue here is whether an industrial and factory enterprise, such as respondent, conducting a completely integrated wholesale and retail business, and also engaged in regularly producing goods for interstate commerce, is entitled to immunity from the provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. A. Secs. 201 *et seq.*) by virtue of the exemption contained in Section 13 (a) (2), 29 U. S. C. A. Sec. 213 (a)(2).

Statute Involved

The pertinent provisions of the Act involved here are Sections 7, and 13(a), Subdivision (2).

Section 7 provides:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date, un-

less such an employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 13 (a), Subdivision (2), provides as follows:

"The provisions of sections 6 and 7 shall not apply with respect to (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

Facts

Both courts below concurred in the conclusion that petitioner, during the course of his employment herein, was an employee engaged in commerce within the purview of Section 7 of the Act, and was, therefore, entitled to its benefits. The reasons therefor are fully set forth in both of the opinions below. This question, however, is not at issue here.

This petition concerns itself solely with the conclusion of the Circuit Court of Appeals that respondent was a "retail or service establishment" and, therefore, entitled to the exemption contained in Section 13 (a)(2) of the Act.

All the pertinent facts regarding the nature and character of the business carried on by the respondent have been fully set forth in the uncontested findings of the Trial Court (R. 472-481). They are as follows:

1. Plaintiff, Max M. Lesser, was employed by the defendant, Sertner's Inc., a domestic corporation, from the 2nd day of January, 1940 to March 17th, 1944.

2. During the aforementioned period, said defendant was engaged in the business of cleaning, processing, renovating,

repairing, etc. of upholstered furniture, draperies, curtains, rugs and carpets.

3. During the aforementioned period, the said defendant was located on, and occupied, the entire twelfth floor (about 125 feet in length) of a loft building, located at 305 E. 63rd Street in the Borough of Manhattan, City and State of New York, which is a factory neighborhood.

4. The stockholders of said defendant corporation were the individuals Murray Sertner and Paul Sertner, who were, respectively, the Secretary-Treasurer and President of said defendant corporation.

5. During the period of his employment herein, plaintiff was employed by the defendant, Sertner's, Inc., as the receiving and shipping clerk and his duties were to take care of and assist in the receiving and shipping of all the merchandise that came in and went out of the premises of the defendant, Sertner's, Inc.; to physically handle, package, assort, route, wrap and unwrap said merchandise; to pack and label boxes, bags and curtains; and to load and unload trucks. He also cleaned furniture, especially after March 5, 1943.

6. During the aforementioned period, the defendant, Sertner's, Inc., was operating its premises in the nature of a full-fledged factory, with its employees engaged in various physical and mechanical operations, such as shipping, receiving, pressing, finishing, bagging of curtains, cleaning of furniture, etc. Said defendant also employed on its premises a female clerical employee, engaged in doing its clerical work and bookkeeping.

7. During the aforementioned period, the ultimate consumer, whose goods were cleaned and processed by this defendant, rarely came into this defendant's premises.

8. During the period at issue, this defendant operated trucks which it used to pick up and deliver all the goods worked on, processed and physically handled by it.

9. This defendant did not possess the necessary furniture, equipment and decorative accessories, nor did it attempt to set up its premises in such fashion as to attract the patronage of the general consuming public. Its business was not procured in this manner; nor, unlike the typical local, neighborhood or corner retail establishment, was it seeking this type of business. The defendant procured no business from strangers off the street who happened to be walking by its premises, nor was it so located or equipped as to handle this type of business. The defendant didn't do any over the counter business with the ultimate consumers.

10. During the period of plaintiff's employment herein, over 90% of the business done by the defendant was charged to the credit of its customers. Less than 10% of the total business done by the defendant was in the nature of C.O.D. transactions (*i.e.* with payment required to be made upon delivery of the goods).

11. Approximately one-third of defendant's total business was procured from and through interior decorators, who recommended their customers or clients to the defendant. The defendant constantly advertised to, and actively solicited the assistance of, interior decorators for business; and paid these interior decorators a commission of approximately 10% on all business obtained from and through them. In such cases the ultimate consumer was considered, both by the defendant and by the interior decorators, as the client or customer of the interior decorators and not that of the defendant. Repeatedly, in its advertising to interior decorators, the defendant referred to the ultimate consumer as the client of the decorator, and

in the correspondence from the interior decorator to the defendant, the interior decorator referred to the ultimate consumer as "my" client.

12. The defendant employed no inside sales clerks on its premises to wait on trade, nor was it the duty or function of any of the other employees of the defendant to wait on trade.

12. (a) Out of an approximate total of twenty employees, defendant employed never less, and sometimes more, than four outside salesmen whose duties it was to go out and solicit busines for it.

13. Defendant did not possess a selling counter, or a cash register to ring up sales, or shelves for the display and convenient arrangement of merchandise, or display windows to attract the patronage of the general public.

14. Defendant maintained on its premises various mechanical equipment used by it in the operation of its business.

15. The customers, for whom the defendant regularly did work or whose goods were so processed by the defendant, resided, or were located, in the five boroughs of the City of New York (*i.e.* Bronx, Manhattan, Queens, Brooklyn and Richmond), in Westchester County, as far north as Harrison, New York, in Nassau and Suffolk Counties (Long Island), in Connecticut and New Jersey.

16. During the entire period of plaintiff's employment, defendant regularly and continuously processed and physically worked on goods belonging to furniture dealers, trade shops and interior decorators. A furniture dealer is a manufacturer or distributor of furniture. A trade shop is a manufacturer or distributor of curtains, drapes, upholstered furniture, slipcovers, rugs and carpets. The

goods so worked on and physically handled by the defendant were, in turn, sold in commerce to third parties by said furniture dealers, trade shops and interior decorators.

17. During the entire period at isue here, the defendant regularly and continuously processed and physically worked on goods belonging to department store and other business, industrial and commercial users, such as hotels, banks, restaurants, manufacturing establishments, etc., and for various institutions, such as churches and hospitals.

18. The work performed by the defendant, Sertner's, Inc., on goods belonging to furniture dealers, trade shops and interior decorators was at a better or cheaper price than that charged for work performed on goods belonging to the individual or private householder or home owner.

19. The total volume of business done by the defendant for each year from 1940 through 1943, together with a breakdown of the business done for each of those years by the defendant, as appears on Defendant's Exhibit K in evidence, is as follows:

1940—Total business done—$106,802.39

	No. of Customers	Percent of total Volume	Amount Billed	
1. Furniture Dealers	27	½ of 1%	$ 512.44	
2. Trade Shops	16	1/10 of 1%	647.63	
3. Decorators	135	8.4%	9,062.20	
4. Department stores	5	1/10 of 1%	655.25	
5. Commercial Consumers	94	6%	6,482.72	
6. Institutions (Churches etc.)	1	1/10 of 1%	114.45	$ 17,474.69
		16 1/10%		
Balance of annual volume, private residences		83 1/10%		$ 89,327.70

1941—Total business done—$117,577.39

	No. of Customers	Percent of total Volume	Amount Billed	
1. Furniture Dealers	27	9/10 of 1%	$ 720.76	
2. Trade Shops	16	9/10 of 1%	717.81	
3. Decorators	186	8.8%	10,395.77	
4. Department stores	6	3/10 of 1%	331.25	
5. Commercial Consumers	156	7 7/10%	8,571.58	
6. Institutions (Churches etc.)	5	1/6 of 1%	185.55	20,925.72
		17 1/3%		
Balance of annual volume, private residences		82 1/3%		$ 96,651.67

1942—Total business done—$121,218.42

	No. of Customers	Percent of total Volume	Amount Billed	
1. Furniture Dealers	32	1/2 of 1%	$ 543.46	
2. Trade Shops	17	3/4 of 1%	969.52	
3. Decorators	167	8%	9,727.64	
4. Department stores	6	3/8 of 1%	462.75	
5. Commercial Consumers	159	7 9/10%	9,271.41	
6. Institutions (Churches etc.)	7	1/3 of 1%	237.26	21,212.04
		17 9/10%		
Balance of annual volume, private residences		82 11/20%		$100,006.38

1943—Total business done—$158,614.08

	No. of Customers	Percent of total Volume	Amount Billed	
1. Furniture Dealers	34	⅛ of 1%	$ 1,168.99	
2. Trade Shops	28	⅓ of 1%	680.22	
3. Decorators	185	7%	11,545.26	
4. Department stores	7	⅓ of 1%	933.34	
5. Commercial Consumers	173	7.9%	12,557.44	
6. Institutions	9	1/10 of 1%	698.03	27,883.28
		17 3/5%		
Balance of annual volume, private residences		82 2/5%		$130,730.80

20. During the period of plaintiff's employment, approximately 2% of the goods and merchandise regularly and continuously processed and physically worked on by the defendant, Sertner's, Inc., belonged to and was shipped to customers outside of the State of New York.

21. The greatest part of the work done by the defendant was done for it by sub-contractors whom it employed for this purpose. On its own premises the deferdant only cleaned, renovated and repaired upholstered furniture. The actual cleaning and renovating of drapes, slipcovers, curtains, rugs and carpets was done by these various sub-contractors.

22. One of the principal divisions of the defendant's total business was the cleaning, renovating and processing of rugs.

23. The actual cleaning, renovating and processing of the rugs, however, was done not by this defendant but by a sub-contractor, the Lincoln Rug Co., located in East

Newark, New Jersey, whom said defendant employed for this purpose.

24. The trucks of the Lincoln Rug Co. used to call daily at the premises of this defendant to pick up the rugs for delivery to the plant of this sub-contractor in East Newark, New Jersey.

25. Also, the trucks of the Lincoln Rug Co. used to redeliver daily to this defendant the rugs which it physically cleaned, renovated and processed for it at its plant at East Newark, New Jersey.

26. Defendant's (*i.e.* Sertner's, Inc.) trucks did, on several occasions each day, bring into its premises truck loads of merchandise which it had picked up from the defendant's customers. Rugs to be cleaned, renovated and processed represented a substantial part of these truck loads of merchandise. Defendant's business with the Lincoln Rug Co. amounted to about $5600 a year.

27. Plaintiff would help unload the defendant's trucks and would physically handle and unwrap said rugs. Plaintiff would then make out job tickets for these rugs, would move them into their respective spaces, and would also make the appropriate entries in the defendant's records regarding the same. Plaintiff then physically prepared these rugs for shipment to the Lincoln Rug Co. and then would help load these rugs into the truck of the Lincoln Rug Co. and would otherwise physically work on and handle said rugs for the purpose of getting them out of the premises of the defendant and into the truck of said Lincoln Rug Co.

28. Plaintiff's physical activities in connection with the rugs which came into the premises of the defendant, Sertner's Inc., and which were then shipped and delivered to New Jersey for processing, renovating and cleaning con-

sumed, during the entire period of his employment herein, consumed several hours of his working time each day. A substantial portion of plaintiff's activities directly related to the movement of the aforementioned rugs in interstate commerce.

29. During the entire period at issue here there was carried on in the premises of the defendant, Sertner's Inc., as a regular and integrated part of the total activities of this defendant, the business of producing and bottling cleaning fluid for sale. This cleaning fluid was called Renofab Cleaning Fluid. In 1940, net sales of this cleaning fluid were in the amount of $1,059.19; in the year 1941 net sales were in the amount of $1,035.34 and for the years 1942, 1943 and 1944 net sales were in the approximate amount of $1,000.00 yearly.

30. Approximately 22% of the sales of the said cleaning fluid were in interstate commerce. The Renofab Cleaning Fluid was owned by a company known as Renofab Products Co., a co-partnership composed of the individual defendants in this action, Murray Sertner and Paul Serner.

31. The Renofab Products Co. never had a bank account, never possessed any books of account, never had any employees, never had any delivery service and had no separate place of business.

32. All the work done in connection with the bottling, producing, manufacturing, selling and shiping out of said Renofab Cleaning Fluid was done by employees of the defendant, Sertner's Inc., including the plaintiff. All the transactions of said Renofab Products Co. were recorded in the books of the defendant, Sertner's Inc., and by the employees of said defendant. The Renofab Cleaning Fluid was delivered by the trucks of Sertner's Inc.

33. There was no segregation or separation of the various types of activities carried on by the defendant, Sertner's Inc., during the period of plaintiff's employment herein. The employees of the defendant, including the plaintiff, performed duties and rendered services in connection with the retail and wholesale business of this defendant; in connection with the manufacture, production, bottling and sale of Renofab Cleaning Fluid; in connection with the services rendered and work performed by it for industrial, business and commercial users; in connection with the services performed and work rendered by the defendant, Sertner's Inc., on goods owned by interior decorators, furniture dealers and trade shops, and which was then resold by them in commerce to third parties; and in connection with work done for private and individual consumers as householders and home owners. The entire enterprise known as Sertner's Inc., encompassing all the different activities set forth in this finding, was consolidated and operated as one distinct and integrated business unit.

It is petitioner's contention that, based upon the foregoing facts, respondent was not a "retail or service establishment" within the exemption contained in Section 13 (a) (2) of the Act. It will be here demonstrated that the decision of the Circuit Court of Appeals, in this connection, can be supported neither by the legislative history of this section, nor by the official interpretation of the Wage and Hour Administrator which is entitled to great weight (*Roland Electric Co.* v. *Walling*, 326 U. S. 657, 676). It is further the contention of the petitioner that the decision below is inconsistent with decisions of other Circuit Courts of Appeal and, in certain respects, is also inconsistent with decisions of this court.

Reasons for Granting the Writ

1. This case presents an important Federal question which has not been, but should be, settled by this Court.

The principal question here involved, *i. e.*, whether a factory type industry or enterprise, such as respondent, doing a completely integrated retail and wholesale business, and also regularly engaged in producing goods for interstate commerce, is entitled to the exemption contained in Section 13(a)(2) of the Act, has not yet been decided by this court. There are many thousands upon thousands of wage earners throughout the country, employed in similar type of dry cleaning or laundry establishments, etc., whose rights under the Act are affected by the decision below. It is respectfully urged therefore that certiorari should be granted in order to review this question which is of such vital importance to these many employees and their employers.

2. The decision of the Circuit Court of Appeals in this case is, in certain respects, in conflict with the decision of this court in *Roland Electric Co.* v. *Walling*, 326 U. S. 657.

It is unquestioned that, as a regular and integral part of its total activities, respondent was continuously engaged in the producing and bottling of cleaning fluid for sale in interstate commerce (Findings 29, 33; R. 480-481, 37-38, 115-16, 169). Respondent was, by virtue thereof, foreclosed from urging that it was entitled to the exemption contained in Section 13(a)(2) of the Act. This court so held, in *Roland Electric Co.* v. *Walling*, with the terse observation that the "origin of this clause Sec. 13(a)(2), had nothing to do with establishments 'producing goods for [interstate] commerce' " (326 U. S. pp. 666-667).

Nor is the fact that this portion of its business represented but a small portion of its total business sufficient to deprive petitioner from the benefits of the above

decision or to afford immunity to respondent from the Act's provisions. It must not be overlooked that, despite the smallness of this busines, *it, nevertheless, was a regular, integral and continuous* part of the total business done (Findings 29, 33; R. 37-38, 115-116, 169, 480-481). It is the character rather than the size of the activity which is the controlling feature (*Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178; *Skidmore* v. *Casale*, 160 F. (2d) 527; *Davis et al.* v. *Goodman Lumber Co.*, 133 F. (2d) 52, 54).

3. The decision of the Circuit Court of Appeals in this case is inconsistent with decisions of other Circuit Courts of Appeals.

It is obvious that the wholesale activities of the respondent, employer, in processing goods belonging to furniture dealers, interior decorators and trade shops (who were charged better or lower prices than those charged to the ultimate consumer), and who then resold these goods to the ultimate consumer, were not the type of activities embraced within the exemption. Equally non-exempt were its activities in connection with the production of goods for interstate commerce (Findings 16-18). These non-exempt activities were not carried on in separate departments or by separate employees. Quite to the contrary there was here an indiscriminate commingling of exempt and non-exempt activities (Finding 33, R. 481).

Under such circumstances, the Sixth Circuit Court of Appeals recently held, in *Wabash Radio Corp.* v. *Walling*, 162 F. (2d) 391, 394:

> "Where exempt and non-exempt characteristics of the business are so intermingled as to be inseparable, the exemption is denied entirely*."

* Cf. *A. H. Phillips* v. *Walling*, 324 U. S. 490, 496: "The combined retail-wholesale nature of petitioner's interstate business would prevent it from properly being classified as a local 'retail establishment'."

The decision below also is in conflict with the decision of the Fourth Circuit Court of Appeals in *Guess* v. *Montague,* 140 F. (2d) 500, 503, wherein it was held that the retail or service establishment exemption in Section 13(a) (2) "does not extend to manufacturing or processing goods for sale" (140 Fed. (2d) 500, 503). "Nor, in such cases", the Court pointed out, "is the employer's business any the less within the coverage of the Act because some of his activities may include intrastate retail sales or servicing."

4. The legislative history of Section 13 (a) (2) clearly indicates that the court below was in error in extending the exemption to a large scale, factory type industry or enterprise such as conducted by respondent.

It is petitioner's contention that it was the intent of Congress to extend the exemption contained in Section 13 (a) (2) solely to small, local establishments doing a strictly retail business, on an over the counter, cash basis, with the individual ultimate consumer. The legislative history of this section amply demonstrates that a full-fledged, large scale, factory or industrial enterprise such as carried on by respondent was not intended to be embraced within this exemption.

Sec. 13 (a) (2) received the judicial scrutiny of this in *A. H. Phillips* v. *Walling,* 324 U. S. 490, wherein it was stated as follows:

> "From the standpoint of its legislative ancestry, Section 13 (a) (2) is the offspring of a manifest desire to exclude from the scope of the Act *'business in the several states that is of a purely local nature.'* Sen. Rep. 884, 75th Cong., 1st Sess., p. 5. *Congress was interested in exempting those regularly engaged in local retailing activities and those employed by small local retail establishments, epitomized by the corner grocery, the drug store and the department*

store. It felt that retail concerns of this nature do not sufficiently influence the stream of interstate commerce to warrant imposing the wage and hour requirements of them. Ibid, p. 5. Section 13 (a) (2) is a part of the Act only because of the fear that Section 13 (a) (1), in exempting employees regularly engaged in a 'local retailing capacity,' did not clearly exclude those employed by local retailers who are situated near state lines and who make occasional interstate sales. Walling v. Jacksonville Paper Co., 317 U. S. 564, 571." (Emphasis supplied.)

In further demonstrating that the exemption in question was intended to apply solely to the small local or corner retailer doing a "strictly retail" business on an over-the-counter cash basis, this court, in foot note No. 7 to the above case, stated as follows:

"The original language of Sec. 13 (a) (2), introduced as an amendment by Representative Celler, applied to any retail 'industry'. Representative Celler stated that if the amendment were accepted 'retail dry goods, retail butchering, grocers, retail clothing stores, department stores will all be exempt.' Several other Congressmen expressed their desire to assure the exemption of 'the *corner* grocery store man or the filling station man' and 'the *local groceryman,* druggist, clothing store, meat dealer—any merchant in fact.' 83 Cong. Rec. 7299, 7436-7438. The exemption as it finally emerged from the joint House-Senate conference committee applied to any retail 'establishment' rather than 'industry'. *The use of the word 'establishment' is more appropriate to the small local retailers which Congress had in mind and clearly indicates that Congress meant by it something less or different than 'industry' or 'enterprise'.*" (Emphasis supplied.)

A mere cursory inspection of the pertinent and undisputed findings in this case, all based upon more than substantial evidence, amply substantiates the decision of the trial court that, in accordance with the above criteria, appellant was not entitled to a Sec. 13 (a) (2) exemption (Findings 3, 6, 7, 8, 9, 10, 11, 12, 12(a), 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, R. 472-481). Appellant was conducting not a retail service establishment, but a large full scale factory or industrial enterprise and, therefore, was not entitled to immunity from the Act's provisions.

5. The decision below is in conflict with the official interpretation of Section 13 (a) (2) by the Wage-Hour Administrator.

The Wage-Hour Administrator has formally issued an official bulletin interpreting Section 13 (a) (2) entitled "Interpretive Bulletin No. 6". Of course, such interpretive bulletins are persuasive and are entitled to great weight (*Overnight Motor Transp, Co.* v. *Missel,* 316 U. S. 572, foot note No. 17).

In paragraph 3 of Bulletin No. 6, the Wage-Hour Administrator preliminarily states as follows:

> "The courts have indicated that all exemptions in the act should be construed narrowly. *The person claiming an exemption must show affirmatively that his case falls both within the language and the statutory purpose.* Section 13 (a) (2), was intended to apply typically to the grocery store, butcher shop, haberdashery, clothing store, filling station, beauty parlor, hotel, and similar commonly recognized retail and service establishments. *Unless an establishment is clearly a retail or service establishment for purposes of section 13 (a) (2), an assumption that the exemption applies involves considerable risk of violation.*" (Emphasis supplied.)

Later on in the Bulletin the Administrator discusses, at great length, the type of establishment that could claim the benefits of a 13 (a) (2) exemption, and has set up various criteria, which, in all respects, should be possessed by such an establishment. Obviously, in view of the humanitarian purposes of the Act, and the strict construction of an exemption against an employer, the appellant should, if its plea be successful, bring itself squarely within the Administrator's definition. While, normally, departure from, or an inability to fully satisfy, any of the important tests laid down by the Administrator should suffice to invalidate a plea of exemption, it will soon be here amply demonstrated that this appellant has failed to meet many of these tests.

Thus, in paragraph 23 of Bulletin No. 6, the Wage-Hour Administrator has stated as follows:

> "Many of the characteristics outlined above with respect to retail establishments are helpful in determining whether a given establishment is a service establishment within the meaning of section 13 (a) (2). *Service establishments are usually local in character, are usually open to the general consuming public* and usually render a service to private individuals for direct consumption." (Emphasis supplied.)

At bar, appellant was obviously not the type of establishment delineated above (Findings 7, 8, 11, 12, 12(a), 15, 17-20, 29-33).

In paragraph 24 of Bulletin No. 6, the Administrator further states as follows:

> "Typical examples of service establishments akin to retail establishments, within the meaning of the exemption are: Restaurants, cafeterias; roadside diners; hotels; tourist houses; trailer camps; home laundries; barber shops; beauty parlors; public baths; scalptreatment establishments; masseur establishments; funeral homes; embalming establishments;

crematories; establishments engaged in cleaning, dyeing, pressing, altering and repairing hats, clothing, and household goods for private individuals; valet shops; shoe repair shops; shoe-shine parlors; dress-suit rental establishments; public garages; automobile laundries; 'drive it yourself' establishments; battery shops; parking lots; musical instrument repair shops; piano tuning establishments; radio repair shops; watch, clock, and jewelry repair establishments; household refrigerator service and repair shops. These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise."

It is highly apparent from the foregoing that the service establishment, intended by Congress to be exempt from the Act, was, unlike the full-fledged industrial enterprise carried on by appellant, the corner or local retail merchant doing a strictly retail business, principally on a C.O.D. basis, directly with the general consuming public in the locality in which located, or from passersby in the street. Such a retail business would normally render all its services in small quantities, and on an over-the-counter basis, to private individuals rather than to industrial and business users. Clearly, appellant was not this type of establishment (Finding 3, 7-11, 15-20, 29-30).

In paragraph 9 of Bulletin No. 6, the Wage-Hour Administrator further states as follows:

"Although retail establishments are not uniform in appearance or manner of operation, they possess a number of common physical characteristics which serve as a helpful guide in determining whether a particular establishment is appropriately to be classified as a retail establishment for purposes of section 13

(a) (2). Ordinarily sales clerks are employed in the establishment to assist customers in making purchases rather than outside salesmen who solicit orders. Retail establishments usually have selling counters, cash registers to ring up sales, shelves for the display and convenient arrangement of merchandise, and display windows to attract the patronage of the general public. Retail establishments maintain a stock of merchandise on hand and normally make sales over the counter from such stock. They do not have manufacturing equipment or other machinery normally found in factories."

Appellant fails, in every respect, to meet the tests set forth in this paragraph of the bulletin. It employed no inside sales clerks, or any other person to wait on trade; the ultimate retail customer rarely, if ever, came into its premises, and, in direct contravention to the Administrator's test, a substantial portion of its employees were outside salesmen who solicited orders (Findings 7, 12 and 12(a)). Appellant possessed no selling counters, no cash registers to ring up sales, and had no display windows to attract the patronage of the general public. Furthermore, its premises were used as a full-fledged factory, containing various departments, with all sorts of mechanical equipment used in its operations. Also, unlike the typical or purely local service establishment, appellant was located on the twelfth floor of a loft building, in a strictly loft building neighborhood, and, thus, was not in a position to, nor did it attempt to, directly attract the patronage of the general consuming public (Findings 3, 6, 7-9, 11, 12, 12(a), 13-14; R. 472-475).

In paragraph 25 of Bulletin No. 6, the Administrator further states:

"Another example of an establishment which would not be a service establishment * * * is an industrial

> laundry or linen supply company which cleans or supplies coats, covers, towels, sheets, etc., for railroads, hotels, restaurants, beauty parlors, barber shops, stores, hospitals, and other industrial or business customers. Such an industrial laundry or linen supply company, unlike the home laundry which serves private individuals, does not stand in a position similar to that occupied by the retailer."

At bar, appellant regularly and continuously worked on and processed goods in large quantities, and had many transactions in large amounts with various industrial business and institutional users (*i. e.*, not with private householder) such as hotels, banks, churches, restaurants, etc. For this reason also, appellant cannot claim the benefits of the exemption contained in Section 13 (a) (2) (Findings 16-19).*

Furthermore, the Administrator has correctly urged that a producer of goods for interstate commerce cannot, under any circumstance claim a Section 13(a)(2) exemption. Thus, in paragraph 17 of Bulletin No. 6, he states as follows:

> "On the other hand, an establishment which is engaged in manufacturing operations is not a retail establishment even though the goods which it manufactures are distributed at retail."

Finally, in discussing an enterprise which, as here, is engaged in doing a combined or integrated retail and non-

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* Cf., to same effect, paragraph 27 of Bulletin No. 6, wherein the Wage-Hour Administrator states as follows: "As already indicated, establishments which perform a substantial amount of work for industrial or business users, government agencies, institutions, and similar customers may not be considered service establishments. A service establishment is one which performs service for private individuals for person or family use."

retail business, the Administrator concludes, in paragraph 41 of his bulletin, as follows:

> "If the entire enterprise is consolidated and operated as a distinct or integrated business unit; if there is no physical separation whatever between the retail and non-retail branches of the business; then the exemption does not apply. The enterprise would have to be treated as a whole and, as such, could not properly be described as a retail establishment."

The court below, while recognizing the existence here of many of the conditions which the Administrator has stated would preclude an employer from being properly classified as a retail establishment within the exemption (R. 497-498), has, nevertheless, seized upon paragraphs 13 and 28 of Interpretive Bulletin No. 6 as justification for its judgment of reversal.

As one of the many conditions prescribed for determining the applicability of the exemption, the Administrator has stated in those two paragraphs that where more than 75% of an employer's income is derived from retail sales, such fact might lay the ground for a 13 (a) (2) exemption. But it is important to note that this 75% test was promulgated solely in connection with an employer whose total business, unlike here, consisted solely and exclusively in selling or rendering services directly to the ultimate consumer, but where some of the direct ultimate consumers were business or commercial firms, or institutions, such as hotels, restaurants, banks, department stores, etc., as distinguished from private householders.

The Administrator, however, has never issued such a test with respect to a completely integrated wholesale-retail business such as was carried on by petitioner, nor with respect to an establishment also engaged, as a regular and continuous part of its integrated activities, in producing goods for interstate commerce.

Obviously, also, the test was never intended to be all exclusive. Interpretive Bulletin No. 6 is a lengthy document of 23 pages, replete with many tests for determining the applicability of Sec. 13 (a) (2). If the 75% test was intended to be the sole and exclusive grounds for granting or denying the exemption, the interpretive bulletin should then have contained, perhaps, just two paragraphs. Why, therefore, should the Administrator have taken the pains, in his bulletin, to discuss at great length so many other grounds or conditions, the existence of which, in his opinion, would preclude an employer from being properly classified a retail establishment under Sec. 13 (a) (2)? Surely he never intended that the exemption should be automatically granted solely upon a showing of the 75% test prescribed in paragraphs 18 and 28, even if there were present (as at bar) so many of the other conditions which he, in the bulletin, believes to be grounds for rejecting a plea to immunity under this section.

6. The court below unjustifiably gave respondent the benefits of an unusually broad interpretation of Section 13(a) (2) despite this court's admonition to the contrary in *A. H. Phillips Co., Inc.* v. *Walling*, 329 U. S. 490.

Because of the profound public policy with which the Act is affected, because of the great evils sought to be thereby eradicated, and because of the Act's broad humanitarian purposes, all exemptions in the Act must be narrowly and strictly construed. (*Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Bowie* v. *Gonzalez*, 117 F. 2d 11.)

Furthermore, an employer seeking recourse to an exemption under this Act must unmistakably sustain the burden of proof with regard to every material fact upon which the right to exemption must depend. [*Miller Hatcheries* v. *Boyer*, 131 F. 2d 283 (C. C. A. 8, 1942); *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. 2d 567 (C. C. A. 3, 1941);

Helena Glendale Co. v. *Walling,* 132 F. 2d 616 (C. C. A. 8, 1942); *Ralph Knight, Inc.* v. *Mantel,* 135 F. 2d 320 (C. C. A. 8, 1943); *Calaf* v. *Gonzalez,* 127 F. 2d 934 (C. C. A. 1, 1942); *Walling* v. *Reid,* 139 F. 2d 323 (C. C. A. 8, 1943); *Schmidtke* v. *Gonesa,* 141 F. 2d 634 (C. C. A. 1, 1944)].

In commenting on the very exemption here involved, this court, in *A. H. Phillips Co.* v. *Walling,* 329 U. S. 490, aptly stated as follows:

> "The Fair Labor Standards Act was designated 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work'. (Message of the President to Congress, May 24, 1934.) *Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people.*" (Emphasis supplied.)

Despite the foregoing, petitioner respectfully submits that the court below unjustifiedly gave respondent the benefits of an unusually broad interpretation of Sec. 13 (a) (2)

(a) By holding that the nature and character of an employer's business operations, together with its physical set-up, was of no relevancy under this exemption (R. 496-499),

(b) By considering as equally irrelevant the undisputed fact that respondent was actually conducting and operating a large scale, full fledged factory and industrial enterprise,

(c) By adopting the 75% test of the Administrator in paragraphs 18 and 28 of Interpretive Bulletin No.

6 as the all exclusive test for determining the applicability of the exemption, despite the existence of many other circumstances and conditions set forth by him in other portions of his bulletin as grounds for rejecting a claim to the exemption,

(d) When, in aplying the 75% test, it treated as strictly retail sales the business procured by interior decorators who were paid commissions therefor. (Such business represented one-third of the total business done by respondent—Finding 11, R. 474, 500.)

Surely, there was here sufficient doubt that the factory or industrial enterprise conducted by respondent, doing business with customers in three states (Finding 15, R. 475), was the "small, local retailer which Congress had in mind" (*A. H. Phillips Co.* v. *Walling*, 329 U. S. 490) in this section. Surely, also, this is not a case where an employer should be entitled to the exemption because it has unmistakably sustained the burden of proof with regard to every material fact upon which its right to the exemption depends.

CONCLUSION

The writ of certiorari should be granted.

Dated: New York, May 10, 1948.

MAX R. SIMON,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

MAX M. LESSER,
Petitioner,
—against—
SERTNER'S, INC.,
Respondent,
—and—
MURRAY SERTNER and PAUL SERTNER, trading as RENOFAB PRODUCTS CO,
Defendants.

No. [redacted] 55

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MICHAEL M. PLATZMAN,
Attorney for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

MAX M. LESSER, Petitioner, —against— SERTNER'S, INC., Respondent, —and— MURRAY SERTNER and PAUL SERTNER, trading as RENOFAB PRODUCTS CO, Defendants.	No. 804

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The decision of the United States Circuit Court of Appeals for the Second Circuit which is reported in 166 F. (2d) 471 (R. 494-500), reversed a decision of the United States District Court, Southern District of New York, which provided for judgment in favor of petitioner and against Sertner's, Inc. and dismissed the complaint as against the remaining defendants. This opinion is reported at 76 F. Supp. 144 (R. 461-471).

JURISDICTION.

The petitioner seeks to have reviewed the decree of the Circuit Court of Appeals made February 18, 1948 (R. 501). The petition was filed on May 13, 1948, and notice of filing was given to counsel for the respondent on May 21, 1948. Jurisdiction is invoked under Section 240-A of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The only issue is as to whether petitioner was exempted from the provisions of the Fair Labor Standards Act, 29 U. S. C. A. 201 *et seq.*, because he was engaged in a "retail or servicing establishment the greater part of whose selling or servicing is in intrastate commerce."

STATUTES INVOLVED.

Sections 7 and 13(a) of the Fair Labor Standards Act of 1938 (29 U. S. C. A. Sections 201 *et seq.*) are here involved:

Section 7 provides:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such an employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 13(a), subdivision (2), provides as follows:

> "The provisions of sections 6 and 7 shall not apply with respect to (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

STATEMENT.

Petitioner is a former employee of Sertner's, Inc., having been employed from January 1940, to March 1944. He was not employed by the remaining defendants.

Petitioner's reference in his petition and brief in support thereof, to employment by Murray Sertner and Paul Sertner, trading as Renofab Products Co., as well as his claim that the employer, Sertner's, Inc., was engaged in producing cleaning fluid (Pet.'s Br. p. 13) should be eliminated from consideration. These issues regarding "Renofab" were determined against him in the District Court and there was no appeal from that determination.

Sertner's, Inc., is engaged in the cleaning, renovating and repairing of upholstered furniture, draperies, rugs and carpets. Petitioner was hired as a shipping clerk. His duties during the period of his employment consisted of the marking, stamping and otherwise handling merchandise; occasionally assisting in loading and unloading of trucks, and preparation of route assignments. He also performed services in relation to the cleaning of furniture.

There is no dispute that respondent's business was a service business.

Petitioner's recitation of "uncontested findings" contains many statements which are merely his own conclusions—as indicated by "6" (Pet.'s Br. p. 4) wherein he states that Sertner's "was operating its premises in the nature of a full fledged factory." The Circuit Court decided that it was not. It is petitioner's contention, and was the basis for the reasoning of the District Court, that although Sertner's, Inc. was

a service establishment, its business was not of a "retail" character. With this the Circuit Court disagreed. The business consisted in the servicing of various types or groups of individuals and companies and involved the cleaning, renovating and repairing of fine fabrics, upholstered furniture, draperies, curtains, rugs and carpets (fol. 1416). The great bulk of this work was performed on the respondent's premises, the work being called for and delivered by the respondent's truck operating in the city.

The following is an admittedly accurate schedule of the types of customers serviced during the years involved in this litigation and the percentage of the total business of the company, conducted with each such type (fols. 1427-1433):

	1940	1941	1942	1943
1. Furniture dealers	.5%	.6%	.5%	.8%
2. Trade shops	.6%	.6%	.75%	.66%
3. Decorators	8.4%	8.8%	8.0%	7.0%
4. Department stores	.6%	.3%	.37%	.66%
5. Commercial consumers	6.0%	7.2%	7.6%	7.9%
6. Institutions	.1%	.16%	.2%	.4%
7. Private residences	83.8%	82.3%	82.5%	82.6%

The great bulk of respondent's customers as appears above, was the private residence consumer. Respondent's interstate business was insignificant and almost non-existent.

One of petitioner's contentions is that Sertner's, Inc. serviced industrial or commercial establishments. The total so serviced did not exceed 7.9% and even if we were to consider them as non-retail in character it falls far short of the 25% set by the Administrator (par. 18 Interpretation Bulletin, No. 6 of Wage and Hour Division of Department of Labor).

Furthermore, it must be pointed out that the record is completely barren of any testimony that any of the "commercial" users of respondent's facilities, were in turn engaged in the production of goods for interstate commerce so as to bring this case within the provisions of the decisions relied upon by the District Court. The only proof that does exist, is that the respondent did service such types of commercial establishments (fols. 1427-1433). What the activities of these commercial establishments were, does not appear in the record, and there is therefore, no evidence that any of the respondent's customers were engaged in any manner whatever, in the production of goods for interstate commerce.

ARGUMENT.

POINT I.

NO QUESTIONS OF SPECIAL GRAVITY OR GENERAL IMPORTANCE ARE RAISED.

The petitioner does not raise any issue which has not been previously passed upon. The issues of law are clear and have been repeatedly ruled upon. Their application does not present any special problem nor are they of such importance as to require a ruling by this Court.

Petitioner's main contentions seem to be:

1. That the employer carried on both a wholesale and retail business and that any such commingling of activities prevents exemption.
2. That the employer's business was of a wholesale type.
3. That solicitation of business on a commission basis changes its character, from retail to wholesale.

POINT II.

EMPLOYER'S NON-RETAIL ACTIVITIES WERE WELL WITHIN THE LIMIT SET BY THE ADMINISTRATOR.

The Circuit Court aptly pointed out herein:

> "When an establishment makes some non-retail sales, the Administrator has ruled that it will nevertheless be considered a retail establishment unless the gross receipts from non-retail sales constitute more than 25 per cent. of the total gross receipts of the establishment."

In the instant case more than 83% of employer's gross receipts were derived from retail sales of service to occupants of private residences. Even if we were to assume that all other sales of service were "non-retail" in character the test has been met.

Petitioner urges (Pet.'s Br. p. 22) that if *any* sales were "non-retail" in character, the employer loses his exemption. He claims that the 75% test applies only when *all* of the sales were directly to the consumer. Obviously, if *all* of its service were rendered directly to the ultimate consumer the question of 75% would never arise. It only comes about where some service is rendered at retail and some at wholesale. Petitioner's claim, therefore, that where the business renders some wholesale service however slight, it cannot claim exemption, is clearly specious.

POINT III.

RESPONDENT'S BUSINESS IS OF A RETAIL CHARACTER.

The accurate test as to whether the exemption should apply is the nature of the employer's customers. Where the customers are ultimate consumers, the Act does not apply.

Roland v. *Walling*, 326 U. S. 657.

Mr. Justice Burton in the *Roland* case, *supra*, said:

> "the exemption reaches employees of only such retail or services establishments as are comparable to the local merchant, corner grocer or filling station operator who sells or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach."

In the instant case it is undisputed that at least 83% of respondent's customers were ultimate consumers beyond the "end of such flow of goods in commerce."

The petitioner also urges that the employer's business was not retail because it didn't have the characteristics of the corner grocer.

Whether or not the business of a service establishment is of a retail or wholesale character must be determined upon the facts in each individual case. The Administrator has merely set down as a guide some of the elements to look for. That plaintiff's business was not confined to the immediate neighborhood where it was maintained, in and of itself would not make it a wholesale business. The department store, which does business with eight or ten cities surrounding it, all within the state, is still considered a retail establishment within the meaning of the exception to the Act. By the very nature of its business it could not be local (in the sense of a few blocks) in character. Yet this Court has included the department store as a type of retailer covered by the exceptions to the Act.

A. H. Phillips, Inc. v. *Walling*, 65 S. Ct. 807.

And similarly, a transportation company which operates throughout an entire state, has been held to be covered by the exemption.

Guess v. *Montague*, 140 Fed. (2d) 500.

The meaning of the word "local" depends naturally upon the nature of the business itself. What is local to a grocery business which draws its trade from an area of a few blocks cannot be local to a service establishment, and what is local to a service establishment cannot be local to a transportation company covering an entire state. Yet they may all be "retail" in character.

Petitioner also claims that the respondent's business was not set up to attract the attention of the consuming public "in the manner usually associated with retail establishments." Surely the local druggist does not attract his consumer in the same way as would the local shop engaged in the repair of automobiles. Yet they are both unquestionably "retail" in character. There can be no doubt however, that the respondent did take steps to attract the attention of the *consuming public*. (See Defts.' Ex. E, pp. 407-410.) Its business was principally with the *consuming public* and not with trade shops and furniture dealers. Its method of attracting such a clientele was not and could not be the same as the method employed by the grocer or automobile repair shop. All must differ. The concern that delivers coal or fuel oil to the homeowner's cellar has no counter, cash register, shelves or "attractive" store, yet he is clearly a retailer.

The respondent's business is servicing private residences by the cleaning of furniture, rugs, fine draperies, etc. The articles are to a great extent bulky in nature. They necessitate trucks for pick-ups and redelivery, and require a great amount of space to perform their service. The grocer would only require a delivery boy with a bicycle and a basket, whereas the respondent requires a truck. The grocer might require a counter to hand over the articles being sold, and the automobile repairman a garage floor with some repair tools, whereas the respondent required a loft with facilities for cleaning.

A member of the consuming public would bring his clothing to the local tailor for pressing and carry it personally, yet the same customer would ask the respondent to come to his home to clean a large and bulky piece of furniture. The record shows that the respondent, as part of the service, takes down the customer's draperies, cleans and rehangs them (see last sheet of Defts.' E. . E, p. 409). Surely this eliminates an "over the counter" transaction. Fundamentally, in all of these businesses a service is rendered and they are "retail" in character.

POINT IV.

PAYMENT OF COMMISSION TO SECURE BUSINESS DOES NOT MAKE IT NON-RETAIL IN CHARACTER.

Petitioner also argues that the business was not retail because, of the service performed for private residences, some was procured through the recommendations of interior decorators, who received a commission for making the recommendation.

Thus, petitioner concludes, the business was of a "wholesale" character.

The conclusion does not follow. The services that were performed, were performed in small quantities, at a retail price, and to a large number of customers for private use. That the business was obtained through the recommendations of decorators, who received a commission, has no bearing on whether or not the work was done for the ultimate consumer.

It is certainly immaterial, from the point of view of the application of the Act, as to the manner in which these customers were obtained. It would make little difference whether the employer advertised for customers, whether it sent canvassers to ring doorbells and paid them a commission for each customer brought it, or whether it obtained some of its customers through the aid of decorators who

recommended the respondent's service establishment and received a commission on all work thereafter done for the customer so recommended. That the employer, where commission was paid to a decorator, dealt at all times directly with the customer, is beyond question. Such decorators acted as agents on behalf of the respondent and under the well established doctrine of principal and agent, the act of the agent was that of the principal.

Ford v. *Grand Union,* 268 N. Y. 243;

Hurley v. *John Hancock Mutual Life Ins.,* 247 App. Div. 547.

The account, therefore, after being referred by the decorator, was that of the respondent, and no distinction can be drawn between the account recommended by a decorator, acting on behalf of the respondent, and one solicited directly by the respondent. It is clearly the *nature* of the business conducted by the respondent that is determinative, and not the manner in which the respondent obtains its business.

These decorators in effect constituted employees of the respondent. Did the business change in nature because its salesmen may have travelled from house to house or have used the telephone instead of remaining behind a counter? Every salesman, whether of service or of a commodity may perform his own function in a different fashion, dependent upon the nature of the commodity he is selling. The retail character of the service did not become wholesale in nature because it employed as "salesmen", "decorators", whose compensation for services was a commission. If the work was done for and billed to the decorator, and in turn billed by him to the local consumer, that would be wholesale; but where the decorator does not get the work, does not fix the price, nor handle the transaction in any way, other than to recommend the service establishment, the transaction does not lose its retail character because the decorator gets a commission.

POINT V.

CONCLUSION.

The jurisdiction of this Court to review judgments and decrees of the Circuit Court of Appeals is exercised sparingly and then only in cases of peculiar gravity and general importance. The legal questions presented here are elementary. The determination of the Circuit Court of Appeals is in accord with existing decisions. There has been no misinterpretation of the Federal Statutes. Its decision conflicts neither with law announced by other Federal Courts nor with the general weight of authority.

FOR THE FOREGOING REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

MICHAEL M. PLATZMAN,
Counsel for Respondent.

Dated: June 14, 1948.